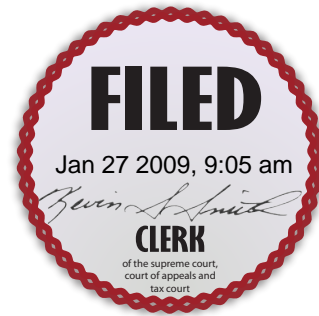


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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KENNETH A. NEAL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 89A01-0804-CR-191
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE WAYNE SUPERIOR COURT  
The Honorable Gregory A. Horn, Judge  
Cause No. 89D02-0804-FA-011

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**January 27, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Kenneth A. Neal appeals his convictions for Possession of Cocaine,<sup>1</sup> a class C felony, Possession of a Narcotic Drug,<sup>2</sup> a class C felony, Possession of Marijuana,<sup>3</sup> a class A misdemeanor, and Public Intoxication,<sup>4</sup> a class B misdemeanor. Neal claims that the trial court improperly admitted the drugs into evidence because the arresting officers lacked probable cause to arrest him for public intoxication. Therefore, Neal argues that the drugs seized from a container following his arrest for public intoxication were the products of an unlawful search and seizure in violation of his rights under the Fourth Amendment to the United States Constitution.

Neal also claims that the ten-year aggregate sentence imposed by the trial court is inappropriate when considering the nature of the offenses and his character. Finding no error, we affirm the judgment of the trial court.

### FACTS

On August 23, 2005, Richmond police officers responded to a complaint that a white male with blonde hair was peeping through windows in a residential neighborhood. At some point, the officers observed Neal walking down the street in that area. Neal matched the description of the prowler, and the officers noticed that he was carrying a twelve-pack of beer and was “weaving” as he walked. Tr. p. 178, 218, 220.

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<sup>1</sup> Ind. Code § 35-48-4-6.

<sup>2</sup> Id.

<sup>3</sup> I.C. § 35-48-4-11.

<sup>4</sup> Ind. Code § 7.1-5-1-3.

Officer John Retherford stopped Neal and asked him for identification. All of the officers at the scene smelled the odor of alcohol on Neal's breath when he responded to their questions. The officers also observed that Neal's eyes were bloodshot and he was unsteady on his feet. When Officer Retherford asked Neal what he was doing in the neighborhood, Neal appeared nervous and responded that he was "on his way home" from a bar. Id. at 13. Neal placed the twelve-pack container on the ground, and the officers arrested him for public intoxication.

Following the arrest, the officers searched Neal and the beer can container. The officers found suspected illegal drugs that had been separately packaged inside the container. Subsequent laboratory tests revealed that one of the baggies contained marijuana and the other packages contained the following: 66.05 grams of cocaine, 65.85 grams of cocaine, 53.04 grams of a cocaine based substance, 3.0 grams of heroin, 8.54 grams of heroin, and 73.70 grams of heroin.

Thereafter, the State charged Neal with several drug offenses and public intoxication. At some point, Neal filed a motion to suppress, alleging that the police officers lacked probable cause to arrest him for public intoxication. Thus, Neal claimed that the drugs were not admissible at trial because they were the product of an illegal search and seizure. The trial court denied Neal's motion to suppress, and following a jury trial on September 27, 2007, Neal was found guilty on Count I, possession of cocaine, a class C felony, Count II, possession of a narcotic drug, a class C felony, Count III, possession of marijuana, a class A misdemeanor, and Count IV, public intoxication, a class B misdemeanor.

At the sentencing hearing that was conducted on October 17, 2007, the trial court identified Neal's criminal history, failed attempts at rehabilitation through probation, and the quantity of cocaine that was seized, as aggravating factors. The trial court found no mitigators and sentenced Neal to five years of incarceration on Count I and to five years on Count II, which were ordered to run consecutive to each other. The trial court ordered the sentences on Counts III and IV to run concurrently with the sentences in Counts I and II. As a result, Neal was sentenced to an aggregate term of ten years. Neal now appeals.

## DISCUSSION AND DECISION

### I. Search and Seizure

Neal argues that the police officers lacked probable cause to arrest him for public intoxication. As a result, Neal argues that the drugs should not have been admitted into evidence because the search of the beer can container was improper.

In resolving this issue, we initially observe that the admissibility of evidence is within the sound discretion of the trial court. Moffitt v. State, 817 N.E.2d 239, 245 (Ind. Ct. App. 2004). We will reverse a trial court's decision regarding the admission of evidence only for an abuse of discretion. Flake v. State, 767 N.E.2d 1004, 1009 (Ind. Ct. App. 2002). An abuse of discretion occurs when the trial court's action is clearly erroneous and against the logic and effect of the facts and circumstances before the court. Id.

A warrantless arrest must be supported by probable cause. Hampton v. State, 468 N.E.2d 1077, 1079 (Ind. Ct. App. 1984). Whether an arresting officer had probable cause to initiate the arrest is determined based on the facts and circumstances known to the officer at

the time of arrest. Id. This court has held that the smell of alcohol and an admission by the defendant of recent consumption of alcohol are not sufficient, alone, to establish probable cause. Irwin v. State, 178 Ind. App. 676, 682, 383 N.E.2d 1086, 1090 (1978). However, additional factors—including the defendant’s bloodshot eyes and unsteadiness on his feet—provide a police officer with sufficient probable cause to make an arrest for public intoxication. See Hampton, 468 N.E.2d at 1079-80 (observing that police officers had probable cause to arrest the defendant for public intoxication when the evidence established that the defendant was unstable on his feet and smelled of alcohol).

As discussed above, the police officers saw Neal “weaving” as he was walking down a public street. Tr. p. 178, 217-18. Neal was carrying a twelve-pack of beer and was unsteady on his feet. Moreover, Neal’s eyes were bloodshot, and the police officers smelled alcohol on his breath. Id. at 175, 178, 220. In our view, this evidence provided the police officers with probable cause to arrest Neal for public intoxication. Hampton, 468 N.E.2d at 1079-80. As a result, the subsequent search of the beer can container was proper. See Fentress v. State, 863 N.E.2d 420, 423-24 (Ind. Ct. App. 2007) (holding that a search incident to lawful arrest allows the arresting officer to conduct a warrantless search of the arrestee’s person and the area within his or her immediate control). Because the search was lawful, the drugs that were seized from the container were properly admitted into evidence. Id.

## II. Sentencing

Neal argues that the ten-year aggregate sentence is inappropriate when considering the

nature of the offenses and his character pursuant to Indiana Appellate Rule 7(B). Specifically, Neal maintains that the imposition of the maximum sentence<sup>5</sup> was not warranted because he is not among the “worst” of the offenders. Appellant’s Br. p. 11. Therefore, Neal maintains that a lesser sentence should have been imposed.

In reviewing a Rule 7(B) appropriateness challenge, we defer to the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that his sentence is inappropriate. Taylor v. State, 891 N.E.2d 155, 162 (Ind. Ct. App. 2008), trans. denied. Our Supreme Court has recently further articulated the role of appellate courts in reviewing a 7(B) challenge:

Ultimately the length of the aggregate sentence and how it is to be served are the issues that matter. . . . And whether we regard a sentence as appropriate at the end of the day turns on our sense of the culpability of the defendant, the severity of the crime, the damage done to others, and myriad other factors that come to light in a given case. . . . There is thus no right answer as to the proper sentence in any given case. As a result, the role of an appellate court in reviewing a sentence is unlike its role in reviewing an appeal for legal error or sufficiency of evidence. . . .

The principal role of appellate review should be to attempt to leaven the outliers, and identify some guiding principles for trial courts and those charged with improvement of the sentencing statutes, but not to achieve a perceived “correct” result in each case. In the case of some crimes, the number of counts that can be charged and proved is virtually entirely at the discretion of the prosecution. For that reason, appellate review should focus on the forest—the aggregate sentence—

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<sup>5</sup> Neal correctly points out that the trial court imposed the maximum aggregate sentence of ten years on the offenses. Indeed, the parties stipulated that only one episode of criminal conduct occurred. In accordance with Indiana Code section 35-50-1-2, a defendant can only be sentenced to the advisory sentence of the next highest felony for which he was convicted if there is only one episode of criminal conduct. Neal was sentenced for committing a class C felony, and the advisory sentence for a class B felony is ten years. Ind. Code § 35-50-2-5. For the additional reason that Neal’s offenses were nonviolent, the aggregate sentence of ten years was the maximum that could be imposed. I.C. § 35-50-1-2.

rather than the trees—consecutive or concurrent, number of counts, or length of the sentence on any individual count.

Cardwell v. State, 895 N.E.2d 1219, 1224-25 (Ind. 2008) (footnotes omitted).

As for the nature of the offenses, the record demonstrates that Neal possessed a large quantity of drugs. Tr. p. 279-82. Indeed, the police officers recovered more than 270 grams of cocaine, heroin, and marijuana, valued at approximately \$36,000. Id. at 279-82, 293-94, 303.

Turning to Neal's character, the record shows that Neal has amassed a lengthy criminal history. More specifically, Neal has accumulated convictions for driving while intoxicated, public intoxication, battery, resisting law enforcement, disorderly conduct, theft, and numerous traffic offenses. PSI at 3-4. Although Neal was granted probation on two occasions, he continues to engage criminal activity. Moreover, Neal has never sought treatment for his substance addictions. Finally, Neal testified that he "lies" so he can support his daily cocaine habit and he has refused to identify his drug supplier. Id. at 320-22, 333, 338-39, 341, 344.

Based upon our review of the offenses and Neal's character, we conclude that the ten-year aggregate sentence is not inappropriate.

The judgment of the trial court is affirmed.

NAJAM, J., and KIRSCH, J., concur.

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